

6 DEC 03

STATE OF MICHIGAN

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

CENTRAL CEILING & PARTITION, INC.,
Plaintiff-Appellee,

Supreme Court No. 121009

Court of Appeals No. 225378

v

DEPARTMENT OF COMMERCE,
Defendant-Appellant,

Wayne County Circuit Court
No. 98-810597-CH

and

KITCHEN SUPPLIERS, INC.,
Defendant-Appellee,

and

CAPPY HEATING AND AIR
CONDITIONING, INC.,
Intervening Plaintiff-Appellee,

and

PRIMEAU HOMES, INC.,
Defendant,

and

WAYNE COUNTY REGISTER OF DEEDS,
Defendant.

**MICHIGAN LAND TITLE ASSOCIATION'S RESPONSE
TO WAYNE COUNTY REGISTER OF DEEDS' BRIEF**

MICHIGAN LAND TITLE ASSOCIATION
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I. INTRODUCTION

On December 29, 2003, this Court ordered that the Wayne County Register of Deeds be added to this suit as a party defendant and required the Wayne County Register of Deeds to file a brief with the Clerk of the Court stating:

(i) the date and time when the lien documents at issue in this case were presented to, and accepted by, the Register, (ii) whether the Register maintained an entry book, MCL 565.24, or lawful equivalent for recording such lien documents between July 1997 and January 1998, (iii) whether the Register maintains an entry book, MCL 565.24, or lawful equivalent for recording such lien documents, and (iv) if not, what steps the Register intends to take with regard to its obligation to record lien documents such as the documents at issue in this case.

The Court also stated in its Order that other parties wishing to respond to the submission by the Wayne County Register of Deeds could do so. The Michigan Land Title Association (“MLTA”), *amicus curiae*, believes that (i) the Wayne County Register of Deeds may not be able to verify the date the lien documents at issue in this case were presented to it, (ii) the Register did not maintain an entry book or lawful equivalent between July 1997 and January 1998, and (iii) the Register does not maintain an entry book or the lawful equivalent of an entry book today. Accordingly, this is MLTA’s response.

II. ARGUMENT

A. Entry Books.

MCL 565.24 requires every register of deeds to keep entry books of deeds and mortgages and a reception book of levies. It also permits the consolidation of reception book entries into one book. MCL 565.25 instructs the register concerning which instruments are to be entered in which entry books. “Liens” are to be entered in the entry book of levies. MCL 565.25 also requires the register to note in the entry books “the day, hour, and minute of receipt, and other

particulars, in the appropriate columns in the order in which the instruments are respectively received.” The statute goes on to state that “every such instrument shall be considered as recorded at the time so noted.” *Id.* Such recordation constitutes notice to the public of its contents. MCL 565.27 directs the register to certify on the face of every instrument recorded the time when it was received. MCL 565.28 requires each register of deeds to maintain a “proper general index,” alphabetically listing the name of each and every party to each instrument recorded with a reference to the liber and page where the instrument is recorded. Computerized indices must be secured by a duplicate index maintained at a separate location from the primary index. *Id.*

The entry books constitute constructive notice to purchasers and refer purchasers to the actual document on file for details. *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880). In that case, Justice Cooley explained why entry books are so important:

[c]onsiderable time must elapse between the entry and the actual copying of the instrument upon the record book, and during all [that] time the entry book will constitute the *record* and will be the means whereby third parties will be notified of conveyances.

44 Mich at 127.

The process differs little today. In every county, there is still a gap in time between when an instrument is received and when it is indexed. The entry books, then, provide the *only* vehicle that the public may use to determine the status of title to a particular parcel of real estate as to all matters received by the register, but not yet indexed. The Michigan recording system cannot function properly without entry books, because instruments presented for recordation would be undiscoverable by a person examining real estate titles for a period of time.

B. Despite the Assertions of the Wayne County Register of Deeds in its Brief and the Claims of the Deputy Register of Deeds in her Affidavit, Wayne County Does Not Maintain Entry Books or their Legal Equivalent.¹

Forest E. Youngblood served as Wayne County Register of Deeds for 25 years—from January 1, 1976, to December 31, 2000. He was the Wayne County Register of Deeds at the time the facts giving rise to this case arose. Mr. Youngblood's affidavit is attached as Appendix A. In it, he explains that prior to 1986, Wayne County did keep entry books, but that upon the implementation of a computerized indexing system, the use of entry books was discontinued. He notes the development of a gap period between the time a document was received and the time it was entered into the computer system and assigned a liber and page number. He also addresses the adoption of the Trimin recording system, which occurred during his tenure in 1996 and 1997 and remains in use today.

Installation of the Trimin system caused a *greater* backlog in recording documents and increased the gap between the time a document was received by the Register of Deeds' office and the time it was assigned a liber and page number. Most importantly, Mr. Youngblood says:

[t]he new, Trimin "image-enabled" indexing application installed in the Wayne County Register of Deeds Office in 1996, like the computerized indexing system before it, had, and currently has no "reception book" component, and does not automatically enter or indicate the date and time a document is received.

Thus, there were and are still no entry books maintained in Wayne County.

¹ Wayne County is not alone in this regard. Many, indeed too many, other Michigan counties also do not maintain entry books. This leads to critical problems for parties competing for title to the same parcel of real estate. This Court has already had to deal with two such cases this term—the present case and *Graves v American Acceptance Mortgage Corporation*, 467 Mich 123, 658 NW2d 482 (currently on appeal, pending decision, with the Michigan Supreme Court). Neither this case nor *Graves* would have arisen had the respective registers of deeds maintained entry books.

But the situation is even worse than that. The Trimin system, according to Mr. Youngblood, does not create a searchable record of documents received by the Register of Deeds until after the instrument is assigned a liber and page, imaged, and indexed, “which sometimes takes weeks or months after the document was actually received by the Wayne County Register of Deeds’ Office.” During this “gap” period between reception and indexing, there is no way for a title searcher to locate the instrument. And, during the time when the facts at issue in this case arose, again according to Mr. Youngblood, Wayne County had no regular system in place to manually stamp the receipt date on documents received. “[N]or was the actual receipt date of a document entered into the Trimin system or any computerized index. No record was kept or created noting the date a document was received for recording by the Wayne County Register of Deeds prior to April, 1997.”

Hence, the Trimin system maintained by Wayne County fails to comply with the statutory requirements for entry books in at least three ways:

- (1) It does not create a searchable record;
- (2) It does not record the “date, hour, and minute of reception;”² and
- (3) During the time at issue in this case, the Trimin system did not even make an accurate record of the date a document was received.³

² This can be critical where the proverbial “race to the courthouse” occurs and, under Michigan’s race-notice recording act, a court must decide which of two parties who recorded on the same day is entitled to priority.

³ Because the Register did not have a system in place to record on the face of a document the time when it was received, the Register may also have violated MCL 565.27, which states that “[t]he register shall certify upon every instrument recorded by him, the time when it was received, and a reference to the book and page where it is recorded.” MCL 565.27.

Nor is the system maintained by Wayne County the legal equivalent of the entry books required by Michigan law. Christine McLenon's affidavit and Exhibits A, C, D and E attached to the Wayne County Register of Deeds' brief demonstrates the deficiency in the Trimin system. On Pages 3-4 of Ms. McLenon's affidavit, in regard to the lien claims in question, she states that "the notice[s] of lien . . . [were] presented to, and accepted by, the Register on December 17, 1997 (time unknown); [they were] recorded February 2, 1998 at [10:37] a.m." But the printouts from the Trimin system in regard to the notices of lien indicate that the "Date Received" was February 2, 1998. This was not the date of receipt; it was the date the liber and page numbers were assigned. Thus, Ms. McLenon's affidavit, which states that the "Trimin system records . . . a 'date stamp' date, representing the date a document is presented to the Register for filing," is clearly incorrect. Additionally, the information located at the top of the lien claims in question (which includes the liber and page number) provides a date of February 2, 1998. There is no way to know, based on the information from the Trimin system, as well as the instruments themselves, that the instruments were received on December 17, 1997. The system employed by Wayne County does not further, but instead hinders, the purpose underlying the requirement of maintaining entry books.

C. The Lien Claims at Issue Would Have Been Deemed Timely Recorded Upon Receipt Had Proper Entry Books Been Maintained By Wayne County.

For purposes of perfection of a lien claim, in the absence of entry books, an instrument should be deemed recorded when it has been presented to the register of deeds, the recording fee has been paid, and it has been accepted by the register of deeds. That is because this point in time best captures the Legislature's intent as set forth in MCL 565.24, .25, and .27. As discussed above, the first thing that the register of deeds is supposed to do upon receipt of an

instrument for recordation is to make a notation of it in the entry book. Included in the notation is to be the day, hour and minute of *receipt*. MCL 565.25(1). It is the time shown in the entry book as when the instrument was received, that an instrument is deemed as having been recorded. That is why MCL 565.27 requires a register to certify the time of receipt on the face of the instrument.

The lien claims at issue in this case would have been deemed recorded upon receipt had there been entry books. No party to this case disputes the lien claimants' contention that the lien claims were presented to and accepted by the Wayne County Register of Deeds on December 17, 1997.

The Construction Lien Act is a remedial statute that is to be liberally construed to secure its beneficial results, intents and purposes. While this Court has properly concluded that recordation must occur strictly within the 90-day period, it could if necessary, and without varying the strictness of that requirement, conclude that a more liberal construction of what constitutes "recordation" is appropriate where a lien claimant has fulfilled every prerequisite to recordation, and it is only the failure of the county register of deeds to comply with the statutory mandate of MCL 565.24 that results in an issue about when recordation occurs.

III. CONCLUSION

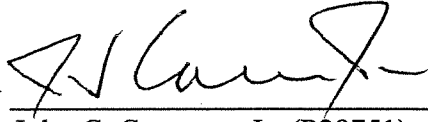
MLTA and its counsel are pleased to maintain a healthy working relationship with registers of deeds throughout the State of Michigan. They are honest, hard-working public servants who are doing their best to accomplish a difficult job on a limited budget. That should

not, however, excuse their failure to comply with the law.⁴ We urge the Court to enter an order requiring compliance with MCL 565.24, MCL 565.25, and MCL 565.28.

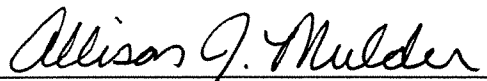
Respectfully submitted,

WARNER NORCROSS & JUDD LLP

Dated: March 19, 2004.

By 
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⁴ Michigan's recording acts may well be due for legislative overhaul. MLTA encourages the Court to invite the Legislature to scrap the present system and develop a new one that is more user-friendly and makes better use of today's technology. Such a system could provide a title examiner with all of the information he or she needs to accurately and completely examine the status of title to real estate throughout Michigan. It could also include a statutory tract index to make searches easier. MLTA and its counsel are ready, willing and able to assist with any legislative effort.

APPENDIX

AFFIDAVIT OF FOREST E. YOUNGBLOOD

State of Michigan)
)ss
County of Wayne)

I, Forest E. Youngblood, being first duly sworn, depose and state as follows:

1. That I was duly elected and served as the Wayne County Register of Deeds from January 1, 1976 to December 31, 2000.

2. That during my tenure as the Wayne County Register of Deeds and, to the best of my knowledge, continuing through today, the processes used to create indexes and records maintained by the Office of the Wayne County Register of Deeds were automated through the use of computer and digital technology.

3. That prior to the implementation of a computerized indexing system in the Office of the Register of Deeds in 1986, a paper "entry" or "reception" book was maintained wherein the date and time of all documents submitted to the Register of Deeds for recording were manually entered into the "reception books" in the order that they were received.

4. Upon installation and implementation of computer indexing systems at the Office of the Register of Deeds, entries into the paper reception book were discontinued based on the notion that the computerized process would increase efficiency and enable the Register of Deeds to record documents on the same day they were received.

5. That, unfortunately, the computerized indexing process was not as efficient as promised, in fact it was slower than the manual indexing process. Over time, a "gap" developed between the time a document was "received" and the time it was entered into the computer system and assigned a book and page number.

6. That in the years 1996 and 1997, the recording and indexing system in the Wayne County Register of Deeds Office was upgraded by IBM with the installation of a new "image-enabled" indexing application developed by Trimin Systems, Inc., a Minnesota corporation.

7. That the installation of a new computer system in the Office of the Register of Deeds in 1996 and early 1997 caused a greater backlog in recording documents, and increased the "gap" between the time a document was received by the Register of Deeds Office and the time it was assigned a liber and page number.

8. That the new, Trimin "image-enabled" indexing application installed in the Wayne County Register of Deeds Office in 1996, like the computerized indexing system before it, had, and currently has no "reception book" component, and does not automatically enter or indicate the date and time a document is received.

9. That in 1996 and the first three months of 1997, there was no regular process used by the Wayne County Register of Deeds to track or record the date or time a document was submitted or "received" for recording, nor was the reception or receipt date entered into the Trimin application.

10. Although the Trimin computer application included a field in which the reception date could be entered, the system was set up to "default" or automatically enter the date on which the liber and page was assigned to the document which, in 1996 and 1997, was weeks or months after the document was actually received.


11. In late March 1997, and as a result of complaints about the untimely recording of construction liens, an attempt was made to correct the recording process and comply with the requirements of MCL 565.25 by instituting a new process whereby the date on which each document was received was manually stamped on the first page of the document, and the

stamped reception date was then manually entered into the "received date" field on the Trimin system.


12. That under the Trimin system, in 1997, and to the best of my knowledge, through today, though a document is received by the Register, it is not searchable until after it is assigned a liber and page, imaged and indexed, which sometimes takes weeks or months after the document was actually received by the Wayne County Register of Deeds' Office.

13. That prior to April 1, 1997, no regular process was in place, or used by the Wayne County Register of Deeds to manually stamp the receipt date on the documents, nor was the actual receipt date of a document entered into the Trimin system or any computerized index. No record was kept or created noting the date a document was received for recording by the Wayne County Register of Deeds prior to April, 1997.

Affiant further sayeth not.


Forest E. Youngblood

Subscribed and sworn to before me
This 11th day of March, 2004.


Notary Public
DENISE A. JONES
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES May 22 2005
972322-3 *acting in Wayne County*

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